

## Internet TV: (Hopefully) Coming to a Computer Screen Near You

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<b>I. INTRODUCTION.....</b>	<b>108</b>
<b>A. Potential Effect of FilmOn Cal.....</b>	<b>110</b>
<b>B. Solution Summary.....</b>	<b>111</b>
<b>II. BACKGROUND .....</b>	<b>111</b>
<b>A. History: From Satellites on Hilltops to TV on     Your Lap.....</b>	<b>111</b>
<b>i. The Traditional Cable Systems .....</b>	<b>111</b>
<b>ii. The Copyright Act of 1976.....</b>	<b>112</b>
<b>iii. Satellites.....</b>	<b>112</b>
<b>iv. Internet Retransmission Services: The Aereo         Decision .....</b>	<b>113</b>
<b>B. Congress and the Copyright Office on the Compulsory     License.....</b>	<b>115</b>
<b>i. Legislative Intent.....</b>	<b>115</b>
<b>ii. The Copyright Office's Interpretation .....</b>	<b>115</b>
<b>iii. Current Ideology of the Compulsory License.....</b>	<b>116</b>
<b>C. Ivi II, FilmOn Cal, and FilmOn DC .....</b>	<b>116</b>
<b>i. Ivi II.....</b>	<b>117</b>

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ii. FilmOn Cal .....	118
iii. FilmOn DC .....	120
D. Additional Case Law .....	122
E. Current State of the Law .....	122
i. No Movement from Congress .....	122
ii. FCC Taking Sides? .....	123
III. ANALYSIS .....	123
A. Agency Deference .....	124
i. The Second Circuit's Misapplication of Chevron Deference .....	124
ii. Eliminating the Copyright Office's Concerns .....	125
B. If It Walks Like a Duck . . . ..	126
i. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." .....	126
ii. Likened to Cable Systems .....	128
IV. CONCLUSION .....	129

## I. INTRODUCTION

The inductive reasoning test aptly titled, "The Duck Test," provides, "if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck."<sup>1</sup> Judge George Wu echoed this humorous sentiment in *Fox TV Stations, Inc. v. Aereokiller* ("*FilmOn Cal*") holding that FilmOn, an Internet-based retransmission service, was a cable service as defined by 17 U.S.C. § 111(f)(3) of the Copyright Act of 1976 (Copyright Act).<sup>2</sup> Judge Wu did not rely on the legislative history or

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<sup>1</sup> See, e.g., *GE Betz, Inc. v. Zee Co.*, 718 F.3d 615, 630 (7th Cir. 2013) (citations omitted) (determining whether "a participant in a judicial proceeding [that] has all the qualities of a defendant . . . [is], in fact, [] a defendant."); *BMC Indus. v. Barth Indus.*, 160 F.3d 1322, 1338 n. 28 (11th Cir. 1998) (The "duck test" has received wide support from the courts.).

<sup>2</sup> *Fox TV Stations, Inc. v. Aereokiller*, 115 F. Supp. 3d 1152, 1167 (C.D. Cal. 2015) [hereinafter *FilmOn Cal*] ("[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case.").

agency opinions—unlike the Second Circuit<sup>3</sup>—nor did he wax philosophical concerning whether the Internet is a tangible place—unlike the District Court for the District of Columbia.<sup>4</sup> Instead, Judge Wu based his opinion on the plain language of the law and used common sense to determine a facility in this context.

This comment focuses on the recent opinions of the Second Circuit, Central District of California, and District of Columbia District Court, in regards to Internet retransmission services (sometimes referred to as “Internet TV”). The issue in all three cases was whether an Internet retransmission system, which streams copyrighted television programming live and over the Internet, could qualify as a cable system for purposes of section 111 of the Copyright Act and, therefore, be eligible to obtain a “compulsory license” to retransmit broadcast signals.<sup>5</sup> To put it concisely, the issue boils down to whether an Internet retransmission service is a cable system. The Copyright Act defines a cable system as follows:

[A] facility, located in any State . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.<sup>6</sup>

Parties that fall within this definition are eligible for a compulsory license granted by section 111. A compulsory license is “[a] statutorily created license that allows certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a special royalty.”<sup>7</sup> Therefore, a compulsory license granted by section 111 allows a cable system, without the express consent of any copyright owner, to retransmit broadcast television programming to its subscribers for a statutorily imposed fee and subject to several regulations.<sup>8</sup> This is a useful tool for cable companies because it permits them to transmit copyrighted content without spending anytime negotiating for licenses.

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<sup>3</sup> WPIX, Inc. v. IVI, Inc., 691 F.3d 275 (2d Cir. 2012) [hereinafter *Ivi II*].

<sup>4</sup> Fox TV Stations, Inc. v. Filmon X LLC, 150 F. Supp. 3d 1 (D.D.C. 2015) [hereinafter *FilmOn DC*].

<sup>5</sup> *Ivi II*, 691 F.3d at 279.

<sup>6</sup> 17 U.S.C. § 111(f)(3) (2015).

<sup>7</sup> *Compulsory License*, BLACK’S LAW DICTIONARY 1060 (10th ed. 2014).

<sup>8</sup> *Ivi II*, 691 F.3d at 278.

A. *Potential Effect of FilmOn Cal*

The differences of opinion between *FilmOn Cal*, *Ivi II*, and *FilmOn DC*, center around two Internet retransmission companies—Ivi and FilmOn. During their trials, each company argued that its particular system was a cable system for purposes of section 111(c).<sup>9</sup>

By applying *Chevron* deference,<sup>10</sup> the Second Circuit held in *Ivi II* that Ivi was not a cable system for two reasons.<sup>11</sup> First, the legislative history of section 111 suggests that an Internet retransmission company is not a cable company because: (1) Congress never expressly amended section 111 to apply to Internet retransmission services, and (2) Congress enacted the provision to address the difficulties of providing television reception by enabling the expansion of cable systems on a localized, rather than nationwide, platform—a purpose that Ivi was not seeking to address.<sup>12</sup> Second, the court adopted the agency's interpretation of a cable system, which expressly excludes Internet retransmission services, under step two of *Chevron* deference.<sup>13</sup>

In *FilmOn Cal*, Judge Wu declined to follow the Second Circuit and ruled in favor of Internet retransmission services, determining it is a cable system under section 111(c). Judge Wu held that FilmOn should be considered a cable system *so long as* it can show that its system meets other specific requirements, such as satisfying localization requirements and complying with applicable Federal Communications Commission (FCC) regulations.<sup>14</sup> Although the case is pending an appeal in the Ninth Circuit, FilmOn has claimed that its new system—the Lanner System<sup>15</sup>—has improved localization services and will placate the Copyright Office and broadcasters' concerns.<sup>16</sup>

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<sup>9</sup> *Ivi II*, 691 F.3d at 279; *FilmOn Cal*, 115 F. Supp. 3d at 1155–56; *FilmOn DC*, 150 F. Supp. 3d at 23.

<sup>10</sup> A strong form of agency deference, courts will apply it when dealing with an ambiguous statute that an agency has issued a formal rulemaking on. *Chevron* deference instructs a court to first examine legislative history to determine a statute's intent. If still no affirmative intent can be gathered, courts are then to defer to an agency's interpretation of the statute, so long as it is reasonable. See *infra* Part II.C(i); Part III.A.

<sup>11</sup> *Ivi II*, 691 F.3d at 277.

<sup>12</sup> *Id.* at 281–83.

<sup>13</sup> *Id.* at 281–85.

<sup>14</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1171.

<sup>15</sup> *Id.* at 1156.

<sup>16</sup> *Id.* at 1156–58; Margaret Harding McGill, *FilmOn CEO Prods FCC to Bring Local Broadcast TV Online*, LAW360 (Oct. 9, 2015, 7:24 PM), <http://www.law360.com/articles/713112/filmon-ceo-prods-fcc-to-bring-local-broadcast-tv-online> (FilmOn has expressed its willingness to abide by any applicable FCC regulations and has recently spoken to the FCC about the issue).

Analyzing the very same definition that *Ivi II* and *FilmOn Cal* addressed, the court in *FilmOn DC* agreed with *Ivi II*'s outcome, but for different reasons. The DC District Court believed FilmOn is not a cable system because it uses the Internet, a pathway that it does not control, to retransmit content to subscribers.<sup>17</sup> Additionally, the DC District Court applied *Skidmore* deference, a lesser form of deference than *Chevron*.<sup>18</sup> The court found the Copyright Office's interpretation persuasive, and for this reason denied FilmOn a compulsory license.<sup>19</sup>

### B. Solution Summary

This comment argues that the Ninth Circuit Court of Appeals should affirm the *FilmOn Cal* decision and create a circuit split because the district court properly defined a cable system under the Copyright Act and FilmOn's system fits within said definition.

Part II of this comment will do the following: (1) summarize the history of cable systems and the compulsory license; (2) analyze the legislative intent behind the license; (3) provide an in-depth analysis of *Ivi II*, *FilmOn Cal*, *FilmOn DC*, and other related cases; and (4) discuss the philosophy that presently underlies the compulsory license. Part III will explain why the Ninth Circuit should affirm the *FilmOn Cal* decision and break with the Second Circuit and DC District Court.

## II. BACKGROUND

### A. History: From Satellites on Hilltops to TV on Your Lap

#### i. The Traditional Cable Systems

The compulsory license emerged in response to two Supreme Court decisions from 1968 and 1974 that allowed cable systems to retransmit copyrighted work to the masses without having to pay anything to rights holders.<sup>20</sup> The Court held in *Fortnightly Corp. v. United Artists Television, Inc.* that the first cable systems' retransmissions did not constitute copyright infringement because the companies were not performing. The Court reasoned the cable system

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<sup>17</sup> *FilmOn DC*, 150 F. Supp. 3d at 19.

<sup>18</sup> A lesser form of agency deference than *Chevron* deference, courts will "look to the degree of [an] agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position," when reviewing. *FilmOn DC*, 150 F. Supp. 3d 1, 25–26 (D.D.C. 2015).

<sup>19</sup> *FilmOn DC*, 150 F. Supp. 3d at 27–29.

<sup>20</sup> These decisions referred to cable systems as Community Antenna Television (CATV) systems. Courts and academics now refer to CATV systems as cable systems. *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505 (2014) [hereinafter *Aereo III*].

functioned more like a viewer than a broadcaster.<sup>21</sup> As cable systems evolved, the Supreme Court determined in *Teleprompter v. Columbia Broad. Sys.* that cable systems' new features (e.g., their own broadcasting channels and selling commercial space) were still non-infringing and allowed cable systems "to compete more effectively with broadcasters for the television market."<sup>22</sup> *Fortnightly* and *Teleprompter* essentially authorized cable systems "to retransmit broadcast television programming without incurring any costs to the copyright owners."<sup>23</sup>

## ii. The Copyright Act of 1976

Congress amended the Copyright Act in order to better respect the rights of copyright holders and ensure they received fair compensation for their works.<sup>24</sup> Congress enacted section 111(c) compulsory license, requiring cable systems to pay copyright owners to retransmit the owners' content.<sup>25</sup> Through this statute, Congress overturned *Fortnightly* and *Teleprompter*, declaring cable systems' retransmissions to be performances and requiring cable systems pay a fee to retransmit such performances to the public.<sup>26</sup> The compulsory license balances two ideals: (1) the societal benefit cable systems provide (i.e., expansive access to television programming), and (2) the significance of respecting one's property rights.<sup>27</sup> Further, Congress passed the statute to combat the undue burden of requiring cable systems to negotiate with each and every copyright owner to retransmit broadcast signals.<sup>28</sup> The license is conditioned on reporting requirements, payment of royalties, a ban on the substitution or deletion of commercials, and geographical limitations on the license for programs broadcasted by Canadian or Mexican stations.<sup>29</sup>

## iii. Satellites

Not long after the amendments to the Copyright Act, satellite companies entered the retransmission market, requesting compulsory

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *WPIX, Inc. v. Ivi, Inc.*, 765 F. Supp. 2d 594, 602 (S.D.N.Y. 2011) [hereinafter *Ivi*].

<sup>24</sup> *Aereo III*, 134 S. Ct. at 2506.

<sup>25</sup> *Ivi II*, 691 F.3d 275, 278 (2d Cir. 2012).

<sup>26</sup> *Aereo III*, 134 S. Ct. at 2505.

<sup>27</sup> *See Ivi II*, 691 F.3d at 282; U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 1, 3 (2008).

<sup>28</sup> H.R. REP. 94-1476, at 5569, 5704 (1976).

<sup>29</sup> *Id.* at 5704.

licenses. In *Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, the Eleventh Circuit held that satellite carriers qualified as cable systems under section 111 and were entitled to compulsory licenses.<sup>30</sup> The United States Copyright Office (the "Copyright Office" or the "Office") had an issue with this decision because the localized intent of the compulsory license was not meant to apply to national retransmission services and the FCC does not regulate satellites.<sup>31</sup>

In response, Congress enacted the Satellite Home Viewer Act, which denied satellite carriers a section 111(c) compulsory license, but provided them with a separate statutory license.<sup>32</sup> In 1998 Congress enacted 17 U.S.C. § 122, authorizing satellite carriers—once criticized for supporting a nationwide service—to retransmit local broadcast programming back into a local market.<sup>33</sup> Congress has actively legislated in this area, amending section 122 five times since 2002.<sup>34</sup>

#### iv. Internet Retransmission Services: The Aereo Decision

The most recent development within this area of law is *Aereo III*, where the Supreme Court determined that an Internet-based retransmission service *publicly performs* through its retransmissions of copyright owners' content.<sup>35</sup> This is significant because it requires Internet retransmission services to obtain a license from copyright holders in order to retransmit content.

Aereo—which is now defunct—provided retransmissions of TV broadcasts through thousands of small antennas, each of which were attributed to a single, active Aereo subscriber at any time (i.e., no two Aereo subscribers would be assigned the same antenna at once).<sup>36</sup> The subscriber first selected a channel for Aereo's services to translate into data that could be used over the Internet.<sup>37</sup> The data was saved to one of Aereo's servers and retransmitted to that individual's computer for streaming.<sup>38</sup> If two subscribers clicked to view the same programming at the same time, they would each receive an individual copy made for him or her, but of the same material.<sup>39</sup>

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<sup>30</sup> *Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991).

<sup>31</sup> 57 Fed. Reg. 3284 (1992) (codified at 37 C.F.R. § 201.17).

<sup>32</sup> See 17 U.S.C. § 119(2015); 56 Fed. Reg. 31, 580 (1991); 57 Fed. Reg. 3283 (1992).

<sup>33</sup> *FilmOn DC*, 150 F. Supp. 3d 1, 20 (D.D.C. 2015).

<sup>34</sup> *FilmOn Cal*, 115 F. Supp. 3d 1152, 1161 (C.D. Cal. 2015).

<sup>35</sup> *Aereo III*, 134 S. Ct. 2498, 2511 (2014).

<sup>36</sup> *Id.* at 2503.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

Aereo's main argument paralleled the arguments made by the cable systems in *Fortnightly* and *Teleprompter*.<sup>40</sup> Aereo argued that it does not publicly perform the copyright, but rather provides equipment; any performance that may occur happens at the hands of the subscriber.<sup>41</sup> If the Court agreed that Aereo's retransmissions did not constitute a public performance, then Aereo would not be infringing the copyrights of the content it displayed. Additionally, Aereo argued that it only created and retransmitted personal copies of the content to its subscribers because there was only one active subscriber for any one antenna.<sup>42</sup> The Supreme Court disagreed, ruling: (1) Aereo was not just an equipment provider because its systems perform copyrighted material, and (2) Aereo performs when it publicly displays "the same contemporaneous[] [programming to multiple people]," despite its "personal copies" assertion.<sup>43</sup> Therefore, Internet retransmission services, like Aereo, publicly perform when they retransmit copyrighted works. Absent a license from the proper rights holders, such retransmissions infringe on the copyright holders' rights.

In its opinion, the Supreme Court noted Aereo's system bore an "overwhelming likeness to the cable companies targeted by the 1976 amendments" and stated an Internet-based service's overall commercial objective is no different than a cable companies.<sup>44</sup> Further, at oral argument, Justice Sonia Sotomayer stated, "I look at the definition of a cable company, and [Aereo] seems to fit."<sup>45</sup>

Using these comments, Aereo raised a new argument on remand in the Southern District of New York (SDNY): the comparisons laid out in the opinion and Justice Sotomayer's statements held, or at the very least inferred, Aereo was a cable system.<sup>46</sup> In a short opinion, the court dismissed the notion that such statements or comments could have any legal effect and that the analogies made between cable systems and the CATV systems were only for the purposes of finding Aereo to publicly perform.<sup>47</sup> The court stated that simply because

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<sup>40</sup> *Id.* at 2511.

<sup>41</sup> *Aereo III*, 134 S. Ct. at 2504.

<sup>42</sup> *Id.* at 2508–09.

<sup>43</sup> *Id.* at 2506, 2510.

<sup>44</sup> *Id.* at 2508.

<sup>45</sup> Joe Mullin, *Analysis: New motions show gaping holes in Supreme Court's Aereo ruling*, ARS TECHNICA (Aug. 4, 2014, 4:52 PM), <http://arstechnica.com/tech-policy/2014/08/aereo-tells-court-its-bleeding-to-death-but-gets-no-relief/>.

<sup>46</sup> *ABC v. Aereo, Inc.*, 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*17 (S.D.N.Y. Oct. 23, 2014) [hereinafter *Aereo IV*] (several other failed defenses were raised).

<sup>47</sup> *Id.* at \*19–20 (" . . . only the Justices' written opinions have the force of law.").



Aereo was found to perform publicly does not render it a cable system.<sup>48</sup>

*B. Congress and the Copyright Office on the Compulsory License*

*i. Legislative Intent*

Congress created section 111 to balance the societal benefits a cable system provides to the viewing public, with a copyright holders interest in their work.<sup>49</sup> Further, Congress was aware of the impracticality of requiring a potential cable system to negotiate with every individual copyright owner whose work it wished to retransmit.<sup>50</sup> In order to address these competing interests, Congress created a statutorily defined royalty.<sup>51</sup>

*ii. The Copyright Office's Interpretation*

The Copyright Office does not believe Internet retransmission services should qualify for a compulsory license.<sup>52</sup> It considers some differences, such as the nature of delivery, to be fundamental and urge the withholding of a license.<sup>53</sup> Its principal concern, however, is whether Internet retransmissions can be controlled geographically.<sup>54</sup> The localization requirement serves several ends, such as allowing broadcasters to sell advertising space based on region and appropriately deliver content to viewers in different time zones.<sup>55</sup> Despite this view, Verizon and AT&T have obtained compulsory licenses for their respective TV services despite their utilization of Internet Protocol.<sup>56</sup>

The Copyright Office first examined the issue presented by Internet retransmission services in 1999, determining that it was too early to grant the services a compulsory license. In subsequent years, the Copyright Office has made clear its position that Internet

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<sup>48</sup> *Id.* at \*18.

<sup>49</sup> *Ivi II*, 691 F.3d 275, 281 (2d Cir. 2012).

<sup>50</sup> *See supra* Part II.A (The Copyright Act of 1976).

<sup>51</sup> *Id.*

<sup>52</sup> Letter from J. Charlesworth, Copyright Office General Counsel (July 23, 2014).

<sup>53</sup> Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (June 15, 2000).

<sup>54</sup> Letter from Marybeth Peters, Register of Copyrights, to the Honorable Howard Coble (Nov. 10, 1999) ("Our principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically.").

<sup>55</sup> *Ivi II*, 691 F.3d 275, 285 (2d Cir. 2012).

<sup>56</sup> *FilmOn Cal*, 115 F. Supp. 3d 1152, 1170 (C.D. Cal. 2015) (citing *Ivi I*, 765 F. Supp. 2d 594, 614 (S.D.N.Y. 2011)).

retransmission services should not receive compulsory licenses.<sup>57</sup> Yet, when discussing “new distribution technologies” in a recent report, the Copyright Office included the following statement:

To be clear, the Office is not against new distribution models that use Internet protocol to deliver programming, but only opposes the circumstance where any online content aggregator would have the ability to use a statutory license to sidestep private agreements and free from any of the limitations imposed on cable operators and satellite carriers by the Communications Act and the FCC’s rules.<sup>58</sup>

Additionally, the Office has acknowledged that the issues presented by such an innovation are entangled with communications law and policy issues, the analysis of which is outside its expertise.<sup>59</sup>

### iii. Current Ideology of the Compulsory License

Internet retransmission services are not alone from being scrutinized by the Copyright Office; the Office actually has a longstanding opposition to the compulsory license itself.<sup>60</sup> The Copyright Office believes the compulsory license allows cable systems to carry local signals for a *de minimis* fee and that a government-administered license “prevents the marketplace from deciding the fair value of copyrighted works.”<sup>61</sup> They see negotiation between the representatives from the industries involved and users as a better solution.<sup>62</sup>

### C. *Ivi II*, *FilmOn Cal*, and *FilmOn DC*

This section will discuss the systems and business model of the respective Internet retransmission systems of Ivi and FilmOn and will further unpack each court’s analysis of the issue. Finally, it will situate the discussion within the greater, national context by examining one other case from the SDNY where the same issue arose.

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<sup>57</sup> Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (June 15, 2000).

<sup>58</sup> U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 188 (2008).

<sup>59</sup> U.S. COPYRIGHT OFFICE, REPORT ON MARKETPLACE ALTERNATIVES TO REPLACE STATUTORY LICENSES (Aug. 29, 2011).

<sup>60</sup> Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (June 15, 2000).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

## i. Ivi II

Ivi's system worked like most cable systems by capturing and retransmitting broadcast signals from stations located across the country, but it differed in two significant ways:

(1) Rather than being restricted to one's local market broadcasting, any Ivi subscriber was able to view, without altering his or her computer settings, live streams from any local station in New York, Los Angeles, Chicago, or Seattle;<sup>63</sup> and

(2) Ivi's service did not comply with the applicable rules, regulations, or authorizations of the FCC.<sup>64</sup>

After transmitting the signal to its subscribers, Ivi rendered the content unusable and prevented it from being viewed, captured, or passed along by its consumers.<sup>65</sup>

To determine the statute's intent, *Ivi II* applied *Chevron* deference.<sup>66</sup> *Chevron* deference is generally warranted when an agency's interpretation of the statute is available, almost always through formal notice.<sup>67</sup> *Chevron* first requires the court to "consider whether Congress has clearly spoken on the issue."<sup>68</sup> If such intent is clear, no more analysis need be done, but if it appears ambiguous, the court must turn to the legislative history to determine the statute's intent.<sup>69</sup> If still no affirmative intent can be gathered, step two instructs the court to "defer to an agency's interpretation of the statute, so long as it is reasonable."<sup>70</sup>

Applying step one, the court found Congress's intent unclear.<sup>71</sup> Specifically, the court could not conclude whether Ivi's "service (1) *is or utilizes a 'facility'* (2) that receives and retransmits signals (3) through [a prescribed communication channel]."<sup>72</sup> Ivi attempted to fit within the definition of a cable system.

Following *Chevron* deference, the court looked to section 111's legislative history and determined it was intended to address the issues of reception and remote access to broadcasting that supports localized,

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<sup>63</sup> *Ivi I*, 765 F. Supp. 2d 594, 598 (S.D.N.Y. 2011).

<sup>64</sup> *Id.* at 599.

<sup>65</sup> *Id.* at 598.

<sup>66</sup> *Ivi II*, 691 F.3d 275, 279 (2d Cir. 2012).

<sup>67</sup> *FilmOn DC*, 150 F. Supp. 3d 1, 25 (D.D.C. 2015) (citing *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001)).

<sup>68</sup> *Ivi II*, 691 F.3d at 279 (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007)).

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* (internal quotations omitted).

<sup>71</sup> *See id.* at 280.

<sup>72</sup> *Id.* (emphasis added).

not nationwide, systems.<sup>73</sup> This analysis proscribed the compulsory license from applying to Ivi's system because Ivi provided a nationwide service.<sup>74</sup> To remove any doubt about the validity of its interpretation of the statute, the court moved on to step two of the *Chevron* analysis and applied the Copyright Office's interpretation of section 111 as it pertains to Internet retransmission services.<sup>75</sup> The court sided with the Copyright Office's interpretation, finding it "reasonable and persuasive."<sup>76</sup>

## ii. FilmOn Cal

FilmOn's retransmission system, referred to as the Lanner system, features "a single master antenna on the roof of a commercial data center, which routes signals to an antenna box where the signals are amplified and captured by small antennas."<sup>77</sup> By selecting a program to view from a list on FilmOn's website, a user's computer has transmitted a signal from FilmOn's servers via the Internet.<sup>78</sup> As a way of managing a subscriber's access to his or her respective local channels, FilmOn processes its subscribers' requests from a *local facility* within a subscriber's region.<sup>79</sup> In anticipation of this trial, FilmOn also enhanced its localization services by requiring a user's credit card address, and a viewing device located in the market area of which programming it was receiving.<sup>80</sup> FilmOn's system also employs a security measure in the form of an "encryption token" that ensures the user with the authorized IP address is the only one able to access the broadcast stream.<sup>81</sup>

FilmOn, unlike Ivi, focused its arguments and efforts leading up to litigation on closing the alleged gap between a more traditional cable system and its system by implementing the following:

(1) FilmOn restarted its operations as a Multichannel Video Programming Distributor to better fit within the FCC regulations;<sup>82</sup>

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<sup>73</sup> See *supra* Part II.A (The Copyright Act of 1976).

<sup>74</sup> *Ivi II*, 691 F.3d at 284.

<sup>75</sup> *Id.* at 283.

<sup>76</sup> *Id.* at 284. See *supra* Part II.B (ii).

<sup>77</sup> *FilmOn Cal*, 115 F. Supp. 3d 1152, 1156 (C.D. Cal. 2015).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1156–57.

<sup>81</sup> *Id.* at 1157.

<sup>82</sup> *Id.* at 1159 ("a multichannel video programming distributor (MVPD) is any person such as . . . a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming").

(2) FilmOn announced—and continues to express—its willingness and ability to comply with all applicable regulations, including FCC ones;<sup>83</sup> and

(3) FilmOn’s system employs several localization safeguards to ensure subscribers are viewing only their local markets.<sup>84</sup>

Proving its eagerness to operate accordingly, FilmOn mailed over one hundred letters to broadcasters requesting knowledge of whether the broadcasters would elect “must-carry” status as required by FCC regulations.<sup>85</sup> Additionally, per the Copyright Office’s compulsory license requirements, FilmOn submitted to them its statements of accounting and paid corresponding fees.<sup>86</sup>

Breaking from *Ivi II*, the court in *FilmOn Cal* did not inquire into the legislative history or move onto the second step of *Chevron* because it did not have the same questions as *Ivi II*—the court concluded Congress’s definition of a cable system to be clear.<sup>87</sup> Namely, Judge Wu did not probe whether the Internet is a facility; instead finding FilmOn’s buildings that are located wholly in particular states, hosting FilmOn’s retransmitting antennas, as the facilities.<sup>88</sup> Before any content is retransmitted, these physical facilities receive the broadcasters’ signals.<sup>89</sup> From there, the content is retransmitted via “wires, cables, microwave, or other communication channels to the corresponding subscribers.”<sup>90</sup> Therefore, per the Copyright Act’s definition of a cable system, FilmOn maintains and controls the facilities that are used for the retransmissions and the operation that in fact *precedes* the Internet in FilmOn’s scheme.<sup>91</sup> Additionally, the court held the terms “headends” and “contiguous communities” do not have any bearing on the definition of a cable system.<sup>92</sup> Instead, the court stated these terms “merely provide[] that certain commonly

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<sup>83</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1170.

<sup>84</sup> *Id.* at 1156–58.

<sup>85</sup> *Id.* at 1159.

<sup>86</sup> *Id.* (During this period, FilmOn failed to pay royalties to the opposing parties involved in this matter).

<sup>87</sup> *See id.* at 1167 (“[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case.”).

<sup>88</sup> *Id.* (adding that the Copyright Office employed a “strange reading of the words ‘facility’ and ‘communications’ channel,” and that *Ivi II*’s reading of § 111 was “overly narrow”).

<sup>89</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1167.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1167–68 (emphasis added).

<sup>92</sup> *Id.* at 1168.

owned cable systems will be treated as a single system for purposes of computing a royalty.”<sup>93</sup>

Therefore, due to the unambiguous, express language of Congress, the court stopped at the first step of *Chevron* deference, deciding that FilmOn was a cable system and thus entitled to a compulsory license granted under section 111.<sup>94</sup> No legislative history analysis or agency deference would be necessary as stipulated through *Chevron* deference.<sup>95</sup> The court added that despite the Copyright Office’s refusal to grant compulsory licenses to Internet retransmission services, the Office does not have the last say on the matter.<sup>96</sup> Instead courts have the option to merely treat the Office’s opinion as persuasive in this context.<sup>97</sup> The Copyright Office acknowledged it does not have the last say when it accepted FilmOn’s payment of statutory fees for purposes of section 111, on a provisional basis.<sup>98</sup>

### iii. FilmOn DC

*FilmOn DC*, a concurrent case involving the same parties and issue as *FilmOn Cal*, reached a different result. While the verdict had the same overall outcome as *Ivi II*, the DC court’s analysis was different.<sup>99</sup> The court first held that FilmOn’s reliance on the Internet rendered it incapable of being a cable system under section 111(f)(3) because its physical facilities first retransmit the signals to Internet service providers, as opposed to the subscribers directly.<sup>100</sup> Despite the fact that FilmOn’s system uses “cables, wires, and microwaves,” it involves a process that utilizes “a global network of interconnected computers.”<sup>101</sup> The court interpreted section 111(f)(3) to read, “any system that fails to encompass the distribution medium and does not retransmit the signals directly to the subscriber does not qualify as a cable system.”<sup>102</sup> Since FilmOn does not control the entirety of its retransmissions path to subscribers, it is not a cable system.<sup>103</sup> Specifically, the court found Internet retransmission systems to differ

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1171.

<sup>95</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1166.

<sup>96</sup> *Id.* at 1164.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See FilmOn DC*, 150 F. Supp. 3d 1, 20 (D.D.C. 2015).

<sup>100</sup> *Id.* at 19.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 20.

<sup>103</sup> *Id.*

from the cable systems in 1976 that “controlled the entire transmission path leading directly to the subscribers.”<sup>104</sup>

The court also denied that the language, “or other communications channels” in section 111(c) expressed Congress’s intent for the compulsory license to encompass evolving technologies.<sup>105</sup> The court concluded that the Internet is not similar or of the same kind as “wires, cables, or microwaves” because it “operates through nebulous international connections in cyberspace thus not constituting a ‘channel’ similar to ‘wires, cables or microwave.’”<sup>106</sup>

Additionally, the court broke from *Ivi II* by refusing to apply *Chevron* deference due to the absence of any formal rulemaking by the Copyright Office.<sup>107</sup> Instead, the DC Court applied *Skidmore* deference.<sup>108</sup> When determining whether to apply *Skidmore* deference, courts must “look to the degree of [an] agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”<sup>109</sup> The court found that the Copyright Office has consistently interpreted section 111(f)(3) to deny that Internet retransmission services are cable systems because they are not “an inherently localized transmission media of limited availability.”<sup>110</sup> The court found this interpretation “persuasive because it is grounded in the statute’s text and legislative history,” and, therefore, allowed *Skidmore* deference to be applied.<sup>111</sup> Due to the Internet’s worldwide capabilities, the court held that FilmOn’s system is not inherently localized and is inconsistent with the Copyright Office’s interpretation.<sup>112</sup>

Applying the definition of a cable system to FilmOn’s, the court disagreed that the Supreme Court’s analysis in *Aereo III* rendered the statute and the transmit clause “technologically-agnostic”—meaning the statute did not refer to types of technology, but only to the broad

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<sup>104</sup> *Id.* at 20–21 (“The Internet also relies on multiple other types of distribution media, such as satellite, cellular networks, and wifi”).

<sup>105</sup> *FilmOn DC*, 150 F. Supp. 3d at 21–22.

<sup>106</sup> *Id.* at 22–23 (“when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows”); The court also refused a broad interpretation of “other communication channels” because it may violate “international obligation[s].”).

<sup>107</sup> *Id.* at 25 (“[T]he Court will not apply *Chevron* deference in the absence of formal rulemaking here because the Copyright Office issued regulations after notice-and-comment in other situations, such as those concerning satellite carriers.”).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 27.

<sup>111</sup> *FilmOn DC*, 150 F. Supp. 3d at 27.

<sup>112</sup> *Id.* at 28.

process of retransmitting signals.<sup>113</sup> The court simply stated that although an Internet retransmission service may be similar to cable systems in the way it performs, this does not mean it is similar to cable systems for all purposes, namely the way it retransmits programming.<sup>114</sup> Nevertheless, in a footnote, the court acknowledged that it too had analogized FilmOn to cable television companies, emphasizing the similarities in regards to its “relationship[s] with broadcasters such as [the] Plaintiffs.”<sup>115</sup>

#### D. Additional Case Law

Following *Aereo III*, FilmOn relied on the comparisons made by the Supreme Court between the traditional cable systems in *Fortnightly* and *Teleprompter* and Internet retransmission systems, arguing that in light of such comparisons, FilmOn qualifies as a cable system.<sup>116</sup> The court disagreed, holding FilmOn placed “too much importance” on the Supreme Court’s cable system analogies, and that such analogies were “not the same as a judicial finding” that *Aereo* is a cable system.<sup>117</sup> Further, the court relied on its precedent from *Ivi II*.<sup>118</sup>

#### E. Current State of the Law

##### i. No Movement from Congress

Unlike with satellite carriers, Congress has yet to codify a statutory provision for Internet-based retransmission services, despite several courts litigating the issue.<sup>119</sup> In addition, despite the well-documented history of displeasure from the Copyright Office,<sup>120</sup> the compulsory license remains an integral part in providing broadcasting to the public and continues to be relied upon for business arrangements. This leaves Internet TV with nowhere to turn but the courts in its fight to provide the public with a new, yet familiar way to consume broadcasting.

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<sup>113</sup> *Id.* at 15.

<sup>114</sup> *Id.* at 16.

<sup>115</sup> *Id.* at 16–17 n.15.

<sup>116</sup> *CBS Broad., Inc. v. FilmOn.com*, 10 Civ. 7532, 2014 U.S. Dist. LEXIS 101894, at \*9 (S.D.N.Y. July 24, 2014) [hereinafter *FilmOn SDNY*].

<sup>117</sup> *Id.* at \*11.

<sup>118</sup> *Id.* at \*12.

<sup>119</sup> *Ivi I*, 765 F. Supp. 2d 594, 616 (S.D.N.Y. 2011).

<sup>120</sup> See *supra* Part II.B(iii).



## ii. FCC Taking Sides?

The FCC is in the process of creating a proposal to determine whether Internet-based services qualify as “multichannel video programming distributors” (“MVPD”) under communications law.<sup>121</sup> The proposal would widen the FCC’s interpretation of MVPD to include any technology that provides a linear stream or programming (i.e., services that provide scheduled TV programming without DVR systems).<sup>122</sup> Therefore, the outcome of this proposal may very well decree Internet retransmission services compatible with FCC regulations. Judge Wu acknowledged this in *FilmOn Cal*, but stated the notice would not affect his decision.<sup>123</sup>

## III. ANALYSIS

This section will set out the arguments for why the Ninth Circuit should affirm its district court’s decision holding FilmOn’s Internet retransmission service to be a cable system for purposes of section 111 of the Copyright Act. First, the application of *Chevron* deference in *Ivi II* is misapplied. It is not at all obvious that that style of deference was warranted as *Ivi II*’s missing analysis would have one believe. Additionally, if any agency deference were to be applied, the Copyright Office’s reasoning would not apply to FilmOn’s compatible technology.<sup>124</sup> Second, Judge Wu provided a straightforward, fair reading of section 111(f)(3) and correctly determined that FilmOn’s Internet-based service fits well within the definition.<sup>125</sup> Finally, the Ninth Circuit should take notice of the several analogies made between Internet retransmission systems and cable systems throughout the several Internet TV opinions; while it may not definitively show that the systems are cable systems, it provides further evidence of their striking similarities.<sup>126</sup>

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<sup>121</sup> Notice of Proposed Rulemaking, In the Matter of Promotional Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, FCC 14-210 (Dec. 19, 2014).

<sup>122</sup> *Id.*

<sup>123</sup> *FilmOn Cal*, 115 F. Supp. 3d 1152, 1170 (C.D. Cal. 2015).

<sup>124</sup> *See infra* Part III.A.

<sup>125</sup> *See infra* Part III.B(i).

<sup>126</sup> *See infra* Part III.B(ii).

*A. Agency Deference**i. The Second Circuit's Misapplication of Chevron Deference*

By applying *Chevron* deference, *Ivi II* held that Ivi was not a cable system by considering the legislative history of the compulsory license and definition of a cable system.<sup>127</sup> To begin this analysis, the Second Circuit stated, “the Copyright Office . . . has spoken on the issue of whether section 111’s compulsory licenses extend to Internet retransmissions. Accordingly, we utilize [*Chevron* deference].”<sup>128</sup> This bare assertion, however, is not a correct analysis of the law because *Chevron* deference is not simply warranted merely by an agency’s interpretation through administrative statements.<sup>129</sup> The scope of when *Chevron* deference may be applied has been limited by recent decisions.<sup>130</sup> Generally, interpretations that lack the force of law do not warrant *Chevron* deference (e.g., opinion letters, policy statements, agency manuals).<sup>131</sup> Even though the absence of a final regulation is not necessarily determinative, “the overwhelming number of cases [that have applied] *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”<sup>132</sup>

The Copyright Office, although consistently stating that Internet retransmission services should not be entitled to compulsory licensing, has never issued regulations formally on the matter.<sup>133</sup> The Office’s position comes from a collection of statements, policy documents, and congressional testimonies.<sup>134</sup> *FilmOn DC* refused to follow *Ivi II* due to the Second Circuit’s failure to explain why *Chevron* deference was warranted.<sup>135</sup> While the absence of a final regulation may not be determinative, “the Copyright Office [has] issued [formal] regulations . . . in other [similar] situations, such as those concerning satellite carriers,” but clearly refused here despite its continuing statements on the matter.<sup>136</sup>

*Ivi II* was an administrative law decision as much as it was a copyright law decision. Given the Copyright Office’s longstanding

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<sup>127</sup> *Ivi II*, 691 F.3d 275, 289 (2d Cir. 2012).

<sup>128</sup> *Id.* at 279 (emphasis added).

<sup>129</sup> *FilmOn DC*, 150 F. Supp. 3d 1, 24–25 (D.D.C. 2015).

<sup>130</sup> *Id.*

<sup>131</sup> *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

<sup>132</sup> *FilmOn DC*, 150 F. Supp. 3d at 25 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (quotation marks omitted)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Id.*

opposition to Internet retransmission systems, and the compulsory license in general, it is not surprising the Second Circuit ruled against Internet retransmission systems. *Chevron* deference should not have been applied in *Ivi II*, however, because of the lack of formal rulemaking from the Copyright Office.

ii. Eliminating the Copyright Office's Concerns

Although *Ivi II* and *FilmOn DC* did not apply the same degree of deference, the two courts still utilized the same set of facts and opinions expressed by the Copyright Office. The Office's stance on the issue expressly rejects the idea that a service such as FilmOn could constitute a cable system.<sup>137</sup> Utilizing *Chevron* deference, *Ivi II* adopted this interpretation, while *FilmOn DC* employing *Skidmore* deference, acknowledged the Office's views were persuasive.<sup>138</sup>

The Copyright Office's interpretation of section 111 supports the notion that to qualify for a compulsory license a cable system must retransmit localized content.<sup>139</sup> While there should be no doubt to this, this was a major concern in *Ivi II* because Ivi's service was not at all localized, allowing for a subscriber in New York to stream a Seattle broadcast.<sup>140</sup> FilmOn, however, is the catalyst in this equation because, unlike Ivi, FilmOn fully supports localization and plans to prove that its system is capable of retransmitting localized broadcasts to the appropriate subscribers within its specific region.<sup>141</sup> As noted by *FilmOn Cal* and *FilmOn DC*, FilmOn has implemented several measures to ensure its retransmissions are properly localized.<sup>142</sup> Therefore, the Copyright Office's geographical concern with Internet retransmission services in general, as cited by the *Ivi II* and *FilmOn DC* decisions, will not apply to FilmOn so long as the company can show on appeal its service's proficient localization measures.<sup>143</sup>

Another attribute of section 111 is that its "operation . . . hinge[s] on the FCC rules regulating the cable industry."<sup>144</sup> Similar to the above analysis, FilmOn is not arguing that its will not or cannot comply with FCC regulations, as Ivi did.<sup>145</sup> Instead, FilmOn understands the importance of compliance and has expressed its willingness and

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<sup>137</sup> See *supra* Part II.B(ii).

<sup>138</sup> *FilmOn DC*, 150 F. Supp. 3d at 27–28.

<sup>139</sup> See *supra* Part II.B(ii).

<sup>140</sup> *Id.*

<sup>141</sup> See *supra* Part II.C(i).

<sup>142</sup> See *supra* Part II.C(iii).

<sup>143</sup> *FilmOn Cal*, 115 F. Supp. 3d 1152, 1171 (C.D. Cal. 2015).

<sup>144</sup> *Ivi I*, 765 F. Supp. 2d 594, 608 (S.D.N.Y. 2011).

<sup>145</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1169.

capability to observe all appropriate FCC regulations.<sup>146</sup> Additionally, the Copyright Office has endorsed compulsory licenses to AT&T and Verizon for their TV services, despite the systems' usage of Internet Protocol.<sup>147</sup> Verizon even brashly advertises across the nation that its system is "not cable."<sup>148</sup>

Finally, the FCC is in the process of creating a proposal that would allow Internet retransmission services to fall within its regulation.<sup>149</sup> Despite opposition from many of the same plaintiffs in the *FilmOn* and *Ivi* cases, FCC Chairman Tom Wheeler has recently advocated to expand the definition of a cable system from the traditional definition utilized by the FCC, to allow for a more competitive market.<sup>150</sup>

*B. If It Walks Like a Duck . . .*

The Ninth Circuit should affirm the district court's decision, holding *FilmOn* to be a cable system under the Copyright Act because *FilmOn* operates physical facilities that receive broadcaster signals and retransmit those signals; this is to say that the Internet is not the receiving "facility," per section 111(f)(3). Additionally, providing some clarity to a controversial question, *FilmOn* and its competitors mirror cable systems in seemingly every way.<sup>151</sup>

- i. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>152</sup>

Applying the definition of a cable system, *Ivi II* and *FilmOn DC* both stopped at the same inquiry: Is the Internet a facility?<sup>153</sup> *Ivi II* left its inquiry at "unclear," but acknowledged that the Internet is not a "tangible entity" that is required of a physical facility.<sup>154</sup> *FilmOn DC* stated the Internet could not be a facility as defined by section 111(f)(3).<sup>155</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1170 (citing *Ivi I*, 765 F. Supp. 2d at 614).

<sup>148</sup> Fios by Verizon, *Fios is Not Cable. We're Wired Differently*, YOUTUBE (June 14, 2016), [https://www.youtube.com/watch?v=LLO8JqVrI\\_E](https://www.youtube.com/watch?v=LLO8JqVrI_E).

<sup>149</sup> *See supra* Part II.E.

<sup>150</sup> *Id.*

<sup>151</sup> *See supra* Part III.A(2).

<sup>152</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>153</sup> *See Ivi II*, 691 F.3d 275, 280 (2d Cir. 2012); *see also FilmOn DC*, 150 F. Supp. 3d 1, 19 (D.D.C. 2015).

<sup>154</sup> *Ivi II*, 691 F.3d at 280 ("[The Internet] is neither a physical nor a tangible entity; rather, it is 'a global network of millions of interconnected computers.'" (Citations omitted)).

<sup>155</sup> *FilmOn DC*, 150 F. Supp. 3d at 19.

The definition of a cable system on its face requires: (1) there to be a facility that “receives” the broadcasters’ signals; (2) that that facility be located in a state or territory; and (3) that the facility retransmit the signals via “wires, cables, microwaves, or other communication channels to subscribing members of the public.”<sup>156</sup> The definition does not limit cable systems to those that “encompass the distribution medium,” nor does it require a system’s retransmissions be “direct[].”<sup>157</sup>

*FilmOn Cal*—rather than “focus[ing] on the mysterious ‘ether’” (a.k.a. the Internet)—simply found that FilmOn’s “antennas, located in particular buildings wholly within particular states,” are the receiving facilities in accordance with section 111(f)(3).<sup>158</sup> These facilities then retransmit the signals through familiar means, such as “wires, cables, microwave, or other communication channels.”<sup>159</sup> Therefore, the Internet is not the facility here.<sup>160</sup> As *FilmOn Cal* observed, all of the electrical instrumentalities—which FilmOn has control over and operates—precede the Internet in its operation.<sup>161</sup> Therefore, applying section 111’s definition of a cable system to the facts, FilmOn’s operational facilities that receive the signals, are physically located in several states, and retransmit the signals through a prescribed communication channel to a localized geographical region. Additionally, despite what *FilmOn DC* held, section 111(f)(3) makes no mention of a requirement for signals to be directly retransmitted to subscribers.<sup>162</sup> Furthermore, even if legislative history purports otherwise, history was broken when AT&T Uverse and Verizon Fios were granted a section 111(c) compulsory license because they use the Internet.

Next *Ivi II* and *FilmOn DC*, agreeing with the Copyright Office, stated that the terms “headends” and “contiguous communities,” found in the second sentence of the cable system definition, evinced a localized service and not a nationwide one.<sup>163</sup> But, this should not affect the Ninth Circuit’s determination. First, because as Judge Wu held, the second sentence of the definition of cable system is intended to distinguish “larger [cable] system[s] for purposes of the royalty

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<sup>156</sup> *FilmOn Cal*, 115 F. Supp. 3d 1152, 1167–68 (C.D. Cal. 2015).

<sup>157</sup> *FilmOn DC*, 150 F. Supp. 3d at 19.

<sup>158</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1167–68.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1167.

<sup>161</sup> *Id.* at 1167–68.

<sup>162</sup> See 17 U.S.C. § 111(f)(3) (2015).

<sup>163</sup> *Ivi II*, 691 F.3d 275, 284 (2d Cir. 2012); *FilmOn DC*, 150 F. Supp. 3d 1, 24 (D.D.C. 2015).

determination,” instead of modifying the definition of cable systems. Second, even if we were to accept the Second Circuit and DC Court’s reading, FilmOn’s service still fits within it, so long as localization safeguards exist.<sup>164</sup>

To the first point, larger cable systems are treated as a single one to ensure they may contribute larger per-subscriber royalty payments—this is the extent of this sentence’s purpose.<sup>165</sup> To the latter point, FilmOn has recently implemented a litany of localization measures and Judge Wu granted it the opportunity to display such safeguards on appeal.<sup>166</sup> So long as it does so, FilmOn will have removed its service from the likes of national ones (e.g., satellites, Aereo, and Ivi) and rendered itself compatible with the localized intent of section 111.

## ii. Likened to Cable Systems

Throughout *Aereo III*, the Supreme Court made undeniable comparisons between Aereo’s system and the traditional cable systems.<sup>167</sup> First, after analyzing the history of the Copyright Act and compulsory license, the Court noted Aereo’s activities were “substantially similar” to traditional cable systems.<sup>168</sup> Immediately following this sentence, the Supreme Court cited a House Report, which stated a cable system’s main operation is “based on the carriage of copyrighted program material.”<sup>169</sup> Second, the Supreme Court noted that any technological differences between Aereo’s system and cable systems—not just traditional cable systems—did not distinguish Aereo’s system in general, its commercial objective, nor its subscribers’ viewing experience.<sup>170</sup>

*FilmOn SDNY* and *Aereo IV* dismissed the argument that such remarks by the Supreme Court established Internet retransmission services as cable systems.<sup>171</sup> The courts were correct that this was not the holding in *Aereo III*, however, to simply dismiss the Supreme

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<sup>164</sup> *FilmOn Cal*, 115 F. Supp. 3d at 1167–68.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1171.

<sup>167</sup> *Aereo III*, 134 S. Ct. 2498, 2506 (2014) (“[A]n entity that acts like a CATV system itself performs.”); (“Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.”); *Id.* at 2510 (“For one thing, the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo ‘perform[s].’”).

<sup>168</sup> *Id.* at 2506.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 2508.

<sup>171</sup> *FilmOn SDNY*, 10 Civ. 7532, 2014 U.S. Dist. LEXIS 101894, at \*11 (S.D.N.Y. July 24, 2014); *Aereo IV*, 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at \*19–20 (S.D.N.Y. Oct. 23, 2014).

Court's unambiguous analogies would be another kind of fallacy. The courts limited the quotes to only bear on the issue of public performance for purposes of the Transmit Clause, but their words and placement may suggest more. Firstly, the court in *Aereo IV* mischaracterized the analogies as only pertaining to traditional cable systems. The Supreme Court clearly provided that Internet retransmission systems are similar to cable systems in general, have the same overall commercial objective, and provide the seam viewing experience through its retransmissions.<sup>172</sup> Secondly, when examining the Transmit Clause, the Supreme Court made clear that the general operation of a cable system is no different than Internet retransmission systems.<sup>173</sup> This is to say that Aereo, and by comparison other Internet TV systems, communicate retransmissions to subscribers analogous to those cable systems already entitled to compulsory licensing.

Moreover, the antagonistic broadcast companies even argued in *Aereo II* "that Aereo's [re]transmissions of broadcast television programs . . . are analogous to the retransmissions of network programming made by cable systems."<sup>174</sup> The broadcasters would go on to declare Aereo's system was "functionally equivalent to a cable television provider."<sup>175</sup>

Given the analogies made by the Supreme Court and the broadcast companies, once FilmOn can display its improved localization safeguards and compliance with applicable regulations, what more is necessary to show it is a cable system? Indeed "an implication is not a holding,"<sup>176</sup> but it is a significant connection that the Ninth Circuit should take notice of in its impending decision.

#### IV. CONCLUSION

The *Ivi II*, *FilmOn Cal*, and *FilmOn DC* decisions provide insight as to how one statute can be interpreted several different ways. The decision can become more confusing when legislative history from 40 years ago and an agency's opinion enter the fray. *FilmOn Cal* establishes the best, clear-cut interpretation of section 111. By reading the statute for what it is and correctly refraining from the Copyright

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<sup>172</sup> *Aereo III*, 134 S. Ct. at 2506, 2508 ("[The technological differences] do not render Aereo's commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo's subscribers.").

<sup>173</sup> *Id.* at 2510.

<sup>174</sup> *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 686 (2d Cir. 2013).

<sup>175</sup> *Id.* at 693.

<sup>176</sup> *FilmOn SDNY*, 10 Civ. 7532, 2014 U.S. Dist. LEXIS 101894, at \*11 (S.D.N.Y. July 24, 2014).

Office's discouraging opinion, Judge Wu was able to correctly determine that FilmOn's system is a cable system within the definition and would be entitled to a compulsory license following a display of its improved measures.